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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1656

JOHN C. MOE, Individually and in his Official Capacity as Sheriff in and for the County of Missoula, Montana, et al., *Appellants and Cross-Appellees*,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., *Appellees and Cross-Appellants.*

THE STATE OF MONTANA, et al., *Appellants*,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., *Appellees.*

On Appeal from the United States District Court for the District of Montana

APPELLEES' MOTION TO AFFIRM

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Appellees move the Court to affirm the judgments sought to be reviewed on the main appeal on the ground it is manifest the questions involved are so insubstantial as not to need further argument.

I.

Appellants seek full review of decisions of a three-judge panel [1] of the United States District Court for

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[1] Convened pursuant to 28 U.S.C. § 2284 to determine a challenge to the constitutionality of state statutes as applied to plaintiffs.

the District of Montana, Missoula Division, in two cases involving the jurisdiction of the State of Montana to tax members of the Confederated Salish and Kootenai Tribes residing within the Flathead Indian Reservation. As is completely set forth in the Jurisdictional Statement filed simultaneously with this Motion by appellees (as cross-appellants), the lower court in ***Moe, et al.*** v. ***Confederated Salish and Kootenai Tribes, et al.*** (the cigarette tax case), held that the state could not require tribal members to possess cigarette vendor licenses in order to sell cigarettes on the Reservation and could not tax sales to Indians residing therein. This portion of the decision is involved in the main appeal.[2]

The lower court also held in ***State of Montana, et al.*** v. ***Confederated Salish and Kootenai Tribes, et al.*** (the personal property tax case), that, on the authority of ***Moe,*** the state could not tax the personal property of tribal members residing within the Reservation. This entire decision is involved in the main appeal. The three main opinions in the cigarette tax case appear in the Appendix to Appellants' Jurisdictional Statement (App., pp. 11-35, 37-71, 73-86), and the single opinion in the personal property tax case is at App., pp. 3-10.

II.

The questions on the main appeal lack substantiality for review because the lower court, in deciding them, simply followed the consistent decisions of this Court.

[2] The lower court also held in *Moe* that the state could require tribal members to precollect for the state the tax on cigarette sales within the Reservation by members to non-Indians. This portion of the decision is involved in the cross-appeal.

No other result is permissible unless a series of landmark Indian cases is to be suddenly overturned.

The lower court was faced with the fact that the United States, by the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App., pp. 117-24), reserved for the "exclusive use and benefit" of the Salish and Kootenai Tribes a tract of land, now known as the Flathead Indian Reservation, within the State of Montana. Article II of the Treaty prohibited residence by any white men within the Reservation except those employed by the Indian Service or those obtaining the permission of the Tribes and the Reservation superintendent. This exclusiveness of the Flathead Reservation was preserved and underscored by Congress in the Montana Territorial Act of May 26, 1864, 13 Stat. 85, 86, and in section 4 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the state to disclaim all right, title and interest to the Indian lands within its borders. The state did so by section 2 of Ordinance I, Montana Constitution. The Reservation was opened to non-Indian entry by the Act of April 23, 1904, 33 Stat. 302, as amended. In 1935, the Tribes organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, *et seq.*

In light of this the district court could not avoid following *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), which held that, absent clear Congressional expression to the contrary, the State of Arizona cannot tax Navajo Indians residing on their Reservation. There are no significant legal facts distinguishing the Navajo Reservation from the Flathead Reservation, and appellants have advanced absolutely no distinction between the income tax involved

in *McClanahan* and the taxes involved in the instant cases that would merit different outcomes.

CONCLUSION

Jurisdiction should be noted and the decisions on the main appeal affirmed.

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